

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CRIMINAL CASE NO. 5:23-cr-00041-KDB-DCK**

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
)
 MICHAEL LAMAR GAINES,)
)
 Defendant.)
 _____)

ORDER

THIS MATTER is before the Court on the Defendant’s “(Motion of Relief from the Judgement) (1867) Fed. R. Civ. P. 60 [Ineffective assistance of Counsel].” [Doc. 37].

On February 22, 2024, Defendant pled guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and one count of possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). [Doc. 1: Bill of Indictment; Doc. 17: Plea Agreement; Doc. 19: Acceptance and Entry of Plea Agreement]. On August 28, 2024, he was sentenced to a term of imprisonment of 180 months on Count One and a concurrent term of imprisonment of 240 months on Count Two. [Doc. 29 at 2]. The Court entered the Judgment the same day. [*Id.* at 1]. Defendant has not filed a Notice of Appeal.

Defendant now moves the Court for relief for alleged ineffective assistance of counsel relative to his plea agreement. [Doc. 37]. For relief, Plaintiff seeks a “new plea” and the “opportunity to properly approach the plea [with] an attorney in which there will be merit & integrity.” [*Id.* at 3]. It appears therefore, by the present motion, that Defendant seeks to challenge the legality of his conviction or sentence under 28 U.S.C. § 2255. See 28 U.S.C. § 2255(a) (stating

that federal prisoner may seek to vacate sentence “imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, . . . or is otherwise subject to collateral attack”). Because it appears that Defendant intended to bring an action pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his conviction and sentence, the Court will provide the Defendant with notice, pursuant to Castro v. United States, 540 U.S. 375 (2003), that it intends to recharacterize the pending motion as a motion pursuant to 28 U.S.C. § 2255. Defendant shall be provided an opportunity to advise the Court whether he agrees or disagrees with this recharacterization of the motion.

Before making this decision, Defendant should consider that if the Court construes this motion as one brought pursuant to § 2255, it will be his first § 2255 petition, which will mean that before he can thereafter file a second or successive § 2255 petition, Defendant must receive certification from the United States Court of Appeals for the Fourth Circuit.

The Court will grant Defendant thirty (30) days in which to advise the Court whether he agrees or disagrees with this recharacterization of this motion as a motion to vacate pursuant to 28 U.S.C. § 2255. If the Defendant timely responds to this Order and does not agree to have the motion recharacterized as one under § 2255, he will be required to withdraw his motion. If the Defendant fails to respond to this Order or agrees to have the motion recharacterized as one pursuant to § 2255, the Court will consider the motion pursuant to § 2255 and shall consider it filed as of the date the original motion was filed.

If the Defendant agrees to have the motion considered as one filed pursuant to § 2255, the Court will require Defendant to submit an amended motion on the proper form. In filing an amended and restated motion to vacate, the Defendant must substantially follow the form for §

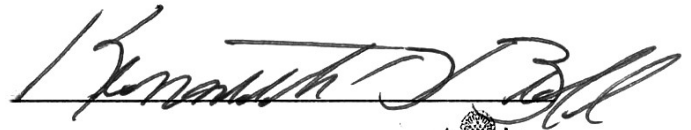
2255 motions which has been approved for use in this judicial district. See Rule 2(c), Rules Governing Section 2255 Proceedings for the United States District Courts.

IT IS, THEREFORE, ORDERED that the Defendant may comply with the provisions of this Order by written filing on or before thirty (30) days from service of this Order.

The Clerk of Court is respectfully directed to provide the Defendant the appropriate § 2255 motion form along with a copy of this Order.

IT IS SO ORDERED.

Signed: September 12, 2024

A handwritten signature in black ink, appearing to read "Kenneth D. Bell", written over a horizontal line.

Kenneth D. Bell
United States District Judge

